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SAP AG, SAP AMERICA, INC., and
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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

ORACLE USA, INC., et al.,

Plaintiffs,

v.

SAP AG, et al.,

Defendants.

Case No. 07-CV-1658 PJH (EDL)

**DEFENDANTS' OBJECTIONS TO
PLAINTIFFS' EVIDENCE FILED IN
SUPPORT OF PLAINTIFFS'
OPPOSITION TO DEFENDANTS'
MOTION FOR PARTIAL SUMMARY
JUDGMENT REGARDING
PLAINTIFFS' HYPOTHETICAL
[FAIR MARKET VALUE] LICENSE
DAMAGES CLAIM**

1 Defendants SAP AG, SAP America, Inc. and TomorrowNow, Inc. (“Defendants”) object
 2 on the grounds set forth below to the declarations and exhibits attached thereto submitted by
 3 Plaintiffs Oracle USA, Inc., Oracle International Corporation, Oracle EMEA Limited and Siebel
 4 Systems, Inc. (“Plaintiffs”) in support of Plaintiffs’ Opposition to Defendants’ Motion for Partial
 5 Summary Judgment Regarding Plaintiffs’ Hypothetical [Fair Market Value] License Damages
 6 Claim (“Opposition”).

7 **Meyer Declaration:** The Declaration of Paul K. Meyer and all exhibits attached thereto
 8 submitted in support of Plaintiffs’ Opposition (“Meyer Declaration” or “Meyer Decl.”) are
 9 entirely irrelevant to Defendants’ Motion for Partial Summary Judgment Regarding Plaintiffs’
 10 Hypothetical License Damages Claim (“Motion”) and for this reason should be disregarded. *See*
 11 Fed. R. Evid. 401, 402. The Meyer Declaration purports to describe how Plaintiffs’ damages
 12 expert would calculate and value Plaintiffs’ claimed actual damages in the form of a hypothetical
 13 lost license. The exhibits attached to the Meyer Declaration are examples of the evidence Mr.
 14 Meyer declares he would take into account when performing this calculation. However, as
 15 explained in Defendants’ Motion and Reply to Plaintiffs’ Opposition to Defendants’ Motion for
 16 Partial Summary Judgment Regarding Plaintiffs’ Hypothetical License Damages Claim (“Reply”),
 17 evidence regarding the amount of a hypothetical license is irrelevant to Defendants’ Motion,
 18 which attacks not the alleged price of a hypothetical license, but its very availability in light of
 19 Plaintiffs’ inability to prove that, but for the alleged infringement, the parties would have agreed
 20 to a license. *See* Motion at § III(B); Reply at §§ II, III(D), filed concurrently.

21 Additionally, Defendants object to the Meyer Declaration as an improper and incomplete
 22 expert opinion, which is not based on “sufficient facts or data” as required by the Federal Rules of
 23 Evidence. Fed. R. Evid. 702. As Mr. Meyer has declared, his analysis of Plaintiffs’ damages
 24 case is “on-going,” and Mr. Meyer has admittedly “not yet reached conclusions, nor [has he]
 25 reviewed all of the documentation and information” at issue in the case. Meyer Decl. ¶ 6.

26 Defendants also object to the Meyer Declaration to the extent that it relies upon evidence
 27 of lost licensing opportunities in its calculations of a hypothetical lost license. *See, e.g.,* Meyer
 28 Decl. ¶ 31 (noting that Meyer would consider in his calculations “the value to Oracle of the

1 copyrighted materials in generating sales of its other products.”). In her recent Order Granting
 2 Defendants’ Motion for Preclusion of Certain Damages Evidence Pursuant to Federal Rules of
 3 Civil Procedure 37(c)(1) and 16(f), Magistrate Judge Laporte found that Plaintiffs had untimely
 4 disclosed evidence of lost licensing opportunities and precluded Plaintiffs from basing a claim of
 5 lost profits on such evidence. *See* D.I. 482 at 1-2, 17-18. Should Plaintiffs ultimately be
 6 permitted to present evidence regarding the price of a hypothetical license, any attempt to rely on
 7 this very same evidence would be inconsistent with Magistrate Judge Laporte’s Order.

8 The foregoing objections to the Meyer Declaration and attached exhibits are made insofar
 9 as the declaration and exhibits are offered in support of Plaintiffs’ Opposition. Defendants
 10 reserve the right to object on additional grounds to any of the statements made in the Meyer
 11 Declaration or to any of the exhibits attached thereto, should that evidence be offered by Plaintiffs
 12 for any other purpose in this litigation.

13 **Ellison Declaration:** The Declaration of Larry Ellison in support of Plaintiffs’
 14 Opposition to Defendants’ Motion for Partial Summary Judgment Regarding Plaintiffs’
 15 Hypothetical License Damages Claim (“Ellison Declaration” or “Ellison Decl.”) is also
 16 objectionable. Defendants object to the Ellison Declaration to the extent that it describes how Mr.
 17 Ellison would calculate a hypothetical license for copyright damages purposes. *See, e.g.*, Ellison
 18 Decl. ¶ 5 (“When presented with the final parameters of licenses . . . from Oracle’s damages
 19 experts, I will analyze those parameters rigorously before opining on what I believe the fair value
 20 would be.”); *see also id.* at ¶ 4. Any evidence regarding the manner in which Mr. Ellison would
 21 calculate a hypothetical lost license for damages purposes is irrelevant, as the instant motion only
 22 concerns whether Plaintiffs have met their burden to prove that the parties would have agreed to
 23 this license in the first place. *See* Fed. R. Evid. 401, 402; Motion at § III(B); Reply at §§ II,
 24 III(B)(3).

25 Moreover, to the extent that the Ellison Declaration directly contradicts Mr. Ellison’s
 26 previous deposition testimony, it should be disregarded as a “sham” declaration. *See* Ellison Decl.
 27 ¶¶ 4, 6. A “party cannot submit a declaration flatly contradicting its prior deposition . . . in an
 28 attempt to ‘create’ an issue of fact and avoid summary judgment.” *Persistence Software, Inc. v.*

1 *Object People, Inc.*, 128 F. Supp. 2d 623, 628 (N.D. Cal. 2000) (Hamilton J.) (citing *Kennedy v.*
 2 *Allied Mutual Ins. Co.*, 952 F.2d 262, 266-67 (9th Cir. 1991)), *vacated on other grounds*, 200
 3 F.R.D. 626 (N.D. Cal. 2001) (Hamilton, J.); *see also* Reply at § III(B)(3). For this reason, Mr.
 4 Ellison’s declaration that the license value Oracle would have demanded from SAP would be
 5 “significantly lower” than his estimate during his deposition, as well as Mr. Ellison’s declaration
 6 contradicting his deposition testimony that Oracle would have demanded a “prohibitively”
 7 expensive price from SAP, should both be disregarded as “sham” attempts to manufacture an
 8 issue of fact. *See* Ellison Decl. ¶¶ 4, 6; Declaration of Tharan Gregory Lanier in Support of
 9 Defendants’ Motion For Partial Summary Judgment Regarding Plaintiffs’ Hypothetical License
 10 Damages Claim (“Lanier Decl.”) ¶ 3, Ex. C (Ellison Depo.) at 74:12-75:9, 78:8-11, 80:3-24.

11 Defendants also object to the Ellison Declaration to the extent that it purports to describe
 12 Oracle’s database reseller agreement with SAP or SAP’s supposed motives in the database market.
 13 *See* Ellison Decl. ¶ 7. First, this evidence lacks foundation, as no evidence was introduced to
 14 establish that Mr. Ellison has or had personal knowledge of the negotiation and terms of the
 15 database reseller agreement or SAP’s supposed plan to undermine Oracle’s market share in the
 16 database market. *See* Fed. R. Evid. 602. Second, Defendants object to the extent that the Ellison
 17 Declaration violates the best evidence rule. *See* Fed. R. Evid. 1002. Specifically, the declaration
 18 improperly seeks to prove the contents of the database reseller agreement. *See* Ellison Decl. ¶ 7
 19 (purporting to speak to the “purpose and allowed uses under” the agreement). Third, to the extent
 20 that the Ellison Deposition references the terms of the database reseller agreement, Defendants
 21 also object to those statements as hearsay, as they are out of court statements introduced to prove
 22 the truth of the matter asserted. *See* Fed. R. Evid. 801, 802.

23 **Catz Declaration:** Defendants also object to the Declaration of Safra Catz in Support of
 24 Plaintiffs’ Opposition to Defendants’ Motion for Partial Summary Judgment Regarding Plaintiffs’
 25 Hypothetical License Damages Claim (“Catz Declaration” or “Catz Decl.”) to the extent that it
 26 describes how Ms. Catz would calculate a hypothetical license for copyright damages purposes.
 27 *See, e.g.*, Catz Decl. ¶ 4 (“The factual assumptions I made base on the broad questions asked were
 28 in fact different from what I now understand to be the necessary inquiry, in determining a

1 hypothetical license *value . . .*”) (emphasis added); *see also id.* at ¶ 5. Any evidence regarding
 2 the manner in which Ms. Catz would calculate a hypothetical lost license for damages purposes is
 3 irrelevant, as the instant motion only concerns whether Plaintiffs have met their burden to prove
 4 that the parties would have agreed to this license in the first place. *See* Fed. R. Evid. 401, 402;
 5 Motion at § III(B); Reply at §§ II, III(B)(3).

6 Moreover, to the extent that the Catz Declaration directly contradicts Ms. Catz’s previous
 7 deposition testimony, it should be disregarded as a “sham” declaration. A “party cannot submit a
 8 declaration flatly contradicting its prior deposition . . . in an attempt to ‘create’ an issue of fact
 9 and avoid summary judgment.” *Persistence Software*, 128 F. Supp. 2d at 628 (Hamilton J.); *see*
 10 *also* Reply at § III(B)(3). For this reason, Ms. Catz’s declaration that the license value Oracle
 11 would have demanded from SAP would be “significantly lower” than the billions she estimated
 12 during her deposition should be disregarded as a “sham” attempt to manufacture an issue of fact.
 13 *See* Catz Decl. ¶ 4; Lanier Decl. ¶ 1, Ex. A (Catz Depo.) at 159:16-23.

14 For the forgoing reasons, the documents described above should be excluded from
 15 evidence.

16
 17 Dated: October 7, 2009

JONES DAY

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 19 By: /s/ Tharan Gregory Lanier
 20 Tharan Gregory Lanier

21 Counsel for Defendants
 22 SAP AG, SAP AMERICA, INC., and
 23 TOMORROWNOW, INC.
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